No. 3848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO., INCORPORATED (a corporation),

Plaintiff in Error,

vs.

COMMERCIAL INDUSTRIAL COMPANY, LTD. (a corporation), successors of J. J. Choorin & Co., A. V. KASSIANOFF & Co.,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the Case.

This is an appeal from an order granting defendant's motion to quash service of summons and dismissing plaintiff's action, upon which judgment was entered in defendant's favor.

The plaintiff in error is a corporation organized under the laws of the State of New York, with its principal place of business in San Francisco, California, where it conducts a wholesale drygoods busi-

ness. The defendant in error is an alien corporation with its principal place of business at Vladivostok, Siberia. In 1920 defendant in error purchased of plaintiff in error a large quantity of dry goods which were shipped to it at Vladivostok. Upon arrival of these goods Commercial Industrial Company, defendant in error, was unable to make payment for the consignment, and finally the goods were reshipped to the United States, under an agreement by which Commercial Industrial Company undertook to pay any loss sustained by the Walton N. Moore Dry Goods Company, plaintiff in error. The loss occasioned amounted to fifty-six thousand seven hundred fifty-two and 53/100 dollars, for which this suit was brought by the Moore Company on August 4, 1921.

On the same day the United States Marshal made service on the defendant in error by delivering a copy of the complaint and summons to Nicholas N. Ivanoff and Vasiliy A. Haieff, Managing Agents of the Commercial Industrial Company at the City and County of San Francisco, State of California.

Thereafter defendant in error appeared specially in the proceeding and filed a motion for an order quashing the service of sumons and for an order dismissing the action. Nicholas N. Ivanoff and Vasiliy A. Haieff filed affidavits in support of the motion, similar in form, stating in substance that the defendant corporation was not organized or existing under and by virtue of the laws of the State of California, had no office nor place of busi-

ness within the Northern District of California, nor elsewhere in the State of California, and had never transacted any business therein; that the contract sued upon was not entered into, to be performed, nor broken in this District, nor in the United States of America. That both of affiants were only temporarily within the State of California and were not present for the purpose of transacting business on behalf of defendant in error; nor were they, or either of them, managing agents nor any other officer or agent of defendant in error or authorized by it to receive or accept service of summons upon it.

The affidavit of Nicholas N. Ivanoff further stated that he was a resident of Russia, temporarily residing in New York City. That he called at the office of Walton N. Moore Dry Goods Co., Incorporated, and consulted Walton N. Moore, President of plaintiff in error, concerning the terms upon which the dispute between the parties could be adjusted in order that he "might make a report on the matter". Later, his affidavit recites, he returned to San Francisco to meet Vasiliy A. Haieff, who arrived in San Francisco with his daughter, in order to act as his interpreter, and accompany him to New York, as he spoke no English. That while in San Francisco he and Mr. Haieff called on Walton N. Moore and he interpreted for them in negotiations "to ascertain upon what terms the said controversy could be settled or adjusted".

The affidavit of Vasiliy A. Haieff set forth that he made the trip to the United States to place his daughter in a school and regain his health, and for no other purpose. He also stated that the purpose of his visit to the office of the plaintiff in error was to ascertain the terms upon which the controversy between the parties could be adjusted so that he could make a report on the matter.

The counter-affidavit of Walton N. Moore contains, among other things, certain letters which the Walton N. Moore Company received in April, 1921, from the defendant in error, specially introducing Nicholas N. Ivanoff *as its representative* for the U. S. A. and Canada. The letter further sets forth among other things—"We instructed Mr. Nicholai N. Ivanoff to *settle* the question about the goods, which were shipped from Vladivostok." etc. * * * (Exhibit A Tr. 47).

Another letter dated March 10, 1921 (Plaintiff's Exhibit B, Tr. 48) addressed to plaintiff in error is to the same effect as to Ivanoff's capacity.

The third letter (Exhibit C, Tr. 49), dated at Harbin, March 8, 1921, addressed to the plaintiff in error is of similar tenor and effect, stating that Nicholas Ivanoff was "Attorney in Fact for the Commercial Industrial Co., Ltd., Successors J. J. Choorin & Co., A. V. Kassianoff & Co., who came to America for attending to all kinds of business and opening of an office for buying merchandise as for the above mentioned firm and also for us",

the writer of the letter setting forth the close relationship of the respective firms.

The fourth letter (Exhibit D, Tr. 50) from Ivanoff to plaintiff in error gave the New York mail address and his cable address.

The fifth letter (Exhibit E, Tr. 51) from New York, signed by the defendant in error, explained the substantial identity of the corporations signing it.

These letters completely support and corroborate the affidavit of Walton N. Moore, who states therein that Ivanoff first came to his office in April, 1921, to advise him that he represented the defendant in error in the United States, and that he was specially authorized and instructed to settle the question respecting the Vladivostok merchandise about which the controversy had arisen, and that on or about the first day of August, 1921, Ivanoff again voluntarily appeared at his place of business and stated that he had come to San Francisco especially for the purpose of adjusting the differences growing out of the shipment of merchandise above mentioned, and asked for a conference to settle the matter as to which defendant in error had specifically authorized and directed him to do. The conference was arranged for the following morning. At the appointed time Ivanoff and Haieff who, as Ivanoff explained, was the principal owner and most important factor in the defendant company, and who had come to San Francisco

especially for the purpose of adjusting with the Moore Company the difference growing out of the shipment of merchandise to Vladivostok, voluntarily appeared in the office of the Moore Company.

Ivanoff, in accordance with defendant in error's letter of March 10, 1921 (Exhibit A), had specific instructions to settle the question about the goods which were shipped from Vladivostok. There is no denial as to any of these facts set forth in Walton N. Moore's affidavit as to the statements made to him by Ivanoff and Haieff respecting their capacities and their purpose in coming to see him and of the purpose of their coming to San Francisco. Mr. Moore did not request either of the two agents of the defendant in error to come into the territory; no inducement was offered to them,—voluntarily and in pursuance of the letters of their company, defendant in error, they called upon and visited Mr. Moore upon the Vladivostok business in an endeavor to settle it.

The counter-affidavit of Walton N. Moore further recited that he received, as stated, a letter in April, 1921, from defendant in error stating that Nicholai N. Ivanoff, its representative, would arrive in the United States to confer with plaintiff in error, following which, Mr. Ivanoff personally presented credentials from defendant in error, which showed him to be the attorney in fact for the defendant in error and appointing him to adjust the dispute which had arisen between the parties, that it placed in Mr. Ivanoff's hands its

agreement for the purpose of formally cancelling the agreement made in Vladivostok by the parties to this action.

In addition to the affidavit of Mr. Moore was an affidavit of G. S. Garrissere, Credit Manager of the California Central Creameries, a corporation, with offices in San Francisco, which stated that Mr. Nicholai N. Ivanoff, representing himself to be the agent and representative of Commercial Industrial Company, on August 20, 1921, conducted some business with his company and purchased from the California Central Creameries ten tubes of fancy Swiss Cheese for shipment to the Orient. That in payment for said purchase Mr. Ivanoff gave a check on a banking house in New York City, drawn by "Commercial Industrial Company, Ltd., a corporation, successors of J. J. Choorin & Co., A. V. Kassianoff & Co.", which check was paid in due course and the merchandise shipped to defendant in error. (Tr. 53.)

After the hearing of the motion to quash service of summons and for the dismissal of the action, the matter was submitted and the learned trial judge held, in a written opinion (Tr. 17) that the defendant in error was not doing business within the jurisdiction of the Court, and, therefore, could not be legally sued in the Northern District of California.

The evidence is conflicting only in this, that the affidavits of Ivanoff and Haieff deny generally

that they, or either of them, are officers of defendant in error, deny that the defendant in error was doing business within the jurisdiction, while the affidavits for the plaintiff in error show specifically the transactions by which Commercial Industrial Company entered into business dealings with Walton N. Moore Dry Goods Co., Inc., and at least one other company in the Northern District of California, and from the statements of both Ivanoff and Haieff, together with letters received from defendant in error, it is clear that they were present in California within the jurisdiction of the Court for the purpose of settling the dispute between the parties and that Haieff was an officer and agent and that Ivanoff was a specially authorized and instructed agent of the Commercial Industrial Company, which specific allegations were not denied by means of affidavits or otherwise. The question is a clean cut one seeking to discover what transactions are necessary to bring an alien corporation within the jurisdiction of the Federal Court.

II.

Specification of Errors.

The assignment of the errors upon which plaintiff in error relies on this appeal will be found on pages 55 and 56 of the Transcript of Record. It is sought to reverse the order and judgment entered for the following reasons:

1. The plaintiff in error claims that the Court erred in granting said motion to quash said service of summons and dismissing said action.

2. The plaintiff in error claims that the Court erred in granting said motion to quash said service of summons.

3. The plaintiff in error claims that the Court erred in dismissing said action.

As all three assignments of error are closely associated, we will consider the points under one group.

NICHOLAI N. IVANOFF SUFFICIENTLY REPRESENTED COMMERCIAL INDUSTRIAL COMPANY IF IT WERE DOING BUSINESS WITHIN THE JURISDICTION.

The statement of facts shows that Nicholai N. Ivanoff appeared in the office of Walton N. Moore Dry Goods Company after a letter had been written by defendant in error to Walton N. Moore Dry Goods Company, which is set forth in Plaintiffs Exhibit A (Tr. 47). The execution of this letter is not denied, except the blanket denial of Nicholai N. Ivanoff that he was an officer or agent of the defendant corporation. The letter introduces him as "our representative for the U. S. A. and Canada".

However, the letter goes beyond the general authority given him and points to the differences between the two corporations by stating:

> "Beside *other things we instructed Mr. Nicholai N. Ivanoff to settle the question about*

> *the goods, which were shipped from Vladivostok.* We feel certain that the mentioned goods realized by you without a loss and according to the agreement made in Vladivostok you will not request from us any additional charges, that will give us the possibility to work with you in the future, having in view to make interesting purchases on your market.
>
> "We handed to Mr. Nicholai N. Ivanoff our agreement for a purpose of formal canceling of same."

If Ivanoff were given authority to adjust a settlement of "the question about the goods, which were shipped from Vladivostok" and was further armed with an agreement for the purpose of cancelling the agreement entered into in Vladivostok prior to that time, and twice called upon Mr. Moore with the same statement of his purpose as appeared in his written authority, can it be held, as the learned trial judge found, that Ivanoff "had been merely specially requested to ascertain upon what terms the controversy between the parties could be accomodated"? (Tr. 26.)

Again, in Plaintiff's Exhibit C (Tr. 49) Mr. Ivanoff was introduced as

> "Attorney in Fact for the Commercial Industrial Company, Ltd., Successors J. J. Choorin & Co., A. V. Kassianoff & Co., who came to America for attending to all kinds of business and opening of an office for buying merchandise as for the above mentioned firm and also for us."

This, however, was not the only transaction which Ivanoff entered into on behalf of the defendant in

error. The affidavit of G. S. Garrissere (Tr. 53) showed that he entered into another contract, that of the purchase of merchandise on behalf of the defendant in error; that he represented himself to be the agent and representative of the defendant in error and paid for the merchandise by a check drawn by the Commercial Industrial Company, Ltd., a corporation successors of J. J. Choorin & Co., A. V. Kassianoff & Co.

The Court was furnished with proof of at least two transactions on the part of the Commercial Industrial Company in which Mr. Ivanoff participated. His actual agency was unequivocably established by documents of the defendant in error, his own statements, and evidence that not only did he endeavor to settle the controversy with the Walton N. Moore Dry Goods Company, but acted as business agent in this jurisdiction for his company in a transaction distinct from the settlement of the claim of plaintiff in error.

VASILIY A. HAIEFF SUFFICIENTLY REPRESENTED COMMERCIAL INDUSTRIAL COMPANY IF IT WERE DOING BUSINESS WITHIN THE JURISDICTION.

The affidavit of Mr. Haieff stated that the reason for his trip to the United States was to place his daughter in a school and to improve his health which had been shattered by reason of his experiences with the Bolsheviks in Russia. Concerning his dealings with the Walton N. Moore Dry Goods

Company, his only purpose, so his affidavit reads, was to ascertain the terms upon which the controversy existing between the parties could be adjusted in order that he might make a report on the matter. This statement, taken in conjunction with the affidavit of Walton N. Moore, wherein he stated that Ivanoff introduced him as the "principal owner and most important factor in the defendant and other associated companies in Vladivostok and Harbin, Manchuria", (Tr. 44) and Haieff's statement that "he was a director of the defendant company and * * * that he was the person who directed the officials of the said corporations" (Tr. 45), leaves a serious question as to whom Mr. Haieff was to make his report of the result of his negotiations. Ivanoff's statement as to Haieff's status with the company would bind the corporation, irrespective of Haieff's admissions. That Ivanoff made a statement to Mr. Moore is uncontroverted and, if true, establishes the authority of Haieff. In any event, Ivanoff had the power to act for the corporation even if under the direction of one of the principal officials and owners of the company.

NICHOLAI N. IVANOFF AND VASILIY A. HAIEFF VOLUNTARILY ENTERED THE JURISDICTION OF THE COURT.

The affidavits on file show that the actions of the two representatives of Commercial Industrial Company were not caused by any inducement upon the part of the officials of the plaintiff in error. There is every indication that their action was voluntary

and for the purpose of effecting a settlement of the differences between the parties. No inducements were made by Walton N. Moore Dry Goods Company to bring them within the jurisdiction for the purpose of bringing action against them, but the adjustment of this claim was part of their business dealings as representatives of defendant in error, which they transacted, together with other business, as appears from the affidavit of G. S. Garrissere.

By reason of their voluntary acts on behalf of the defendant in error, they, as business agents, were representatives of the corporation in California, and as pointed out in a following section, the Commercial Industrial Company was "doing business" in the State of California.

AN ALIEN CORPORATION MAY BE SUED WHEREVER IT MAY BE VALIDLY SERVED.

The defendant in error is a corporation organized and existing under the laws of a foreign government, that of Siberia, with its principal place of business in Vladivostok. The plaintiff in error is a corporation existing under the laws of the State of New York with its principal place of business in the City and County of San Francisco and within the jurisdiction of the Court.

Section 24, subdivision 1 of the Judicial Code gives the District Court jurisdiction.

> "Of all suits of a civil nature * * * where the matter in controversy exceeds, exclusive of

> interest and costs, the sum or value of three thousand dollars and * * * (c) is between citizens of a State and foreign States, citizens or subjects"
>
> (4 Federal Statutes Annotated [2d Ed.], 838.)

If the defendant in error could be validly served in the Northern District of California, the Court would have jurisdiction of the alien corporation, although the contract was not entered into within the jurisdiction, nor was it to be performed here. In re Hohorst, 150 U. S. 653; 37 L. Ed. 1211. Although this case involved an infringement of a patent, the Court pointed out the different position held by an alien corporation from that of a corporation organized under the laws of one of the states of the Union.

The Court said:

> "Upon deliberate advisement, and for the reasons above stated, we are of opinion that the provision of the existing statute, which prohibits suit to be brought against any person 'in any other district than that whereof he is an inhabitant', is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant. Re Louisville Underwriters, 134 U. S. 488 (33 L. Ed. 991)".

See also

> Smithson v. Roneo, 231 Fed. 351;
>
> H. G. Baker & Bro. v. Pinkham, 211 Fed. 728.

DEFENDANT IN ERROR WAS TRANSACTING BUSINESS WITHIN THE JURISDICTION OF THE COURT.

It is the contention of the plaintiff in error that under Section 411 of the Code of Civil Procedure of the State of California which provides for the service of summons on a foreign corporation by the delivery of a copy of the complaint and summons to a managing or business agent, cashier or secretary within the State, valid service may be made on the foreign or alien corporation, in an action upon a contract between the parties, where such officer or agent is in the state expressly to represent his corporation as to such contract, regardless of whether the corporation maintains a regularly established place of business in the State.

An individual may be served in any state where he may be found. A corporation should be entitled to no greater exemption. Particularly should this rule apply to the case of an alien corporation which is doing business with firms or corporations in the United States and in whose own country there may be strife, turmoil and a lack of organized government or judicial institutions and processes for the determination and settlement of controversies. On what basis of reason or public policy should it be held that such a corporation may in the person of its authorized agent enter the state for the purpose of doing business, actually do business there and be immune from service of process which might have reached an individual?

A corporation, whether foreign or alien, should be held to be present in any state to which it sends

its officers or duly authorized agents for the transaction of its corporate business. This would not presuppose that officers or agents of a corporation who were merely passing through a state on pleasure or recreation bent, could by service upon them be the unwilling cause of haling their corporations into the courts of such a jurisdiction. Nor does it mean that even if a corporation sent an agent into a state to do a certain kind or piece of business that the corporation might be brought into Court upon an entirely different matter. But it ought to be, and we believe it is the law, and consonant with the soundest public policy, that a corporation ought to be held to be present in any state to which it sends its officers or agents for the transaction of its corporate business.

Whatever may be said of the presence of Haieff who is one of the directors of the defendant in error and had a controlling part in its management, it is beyond question that Ivanoff had been directly directed by his company "to settle the question about the goods which were shipped from Vladivostok" (Tr. 47). Whether Haieff's presence was merely to determine policy, or to obtain information, or to counsel and advise Ivanoff or the company is entirely immaterial. Ivanoff had the specific power to act, he was not only authorized to do so, he was instructed to do so, and the Walton N. Moore Company was advised of this fact; moreover he actually did attempt to do so and while on one piece of business he did at least one other, evidence of which is before the Court.

Whether the number of business transactions which constitute the doing of business is two or ten is quite immaterial, but it is certain that the corporation in the person of Nicholas Ivanoff was present in the State of California upon business; that it came voluntarily; that the business was the subject of this suit.

There is a well established doctrine in Federal Jurisdictions of the United States that where the manager or authorized officer of a corporation goes into a state on *business of a corporation,* and is there served with process *on account of that business,* such is a valid service of process on the corporation and the Court acquires jurisdiction over it. This was the decision in Houston et al. v. Filer & Stowell Co., 85 Fed. 757. In that case the plaintiffs were residents of Illinois, while the defendant corporation was organized under the laws of Wisconsin. A dispute arising over a contract entered into between the parties, the general manager of the defendant wrote plaintiffs he would be in Chicago on a certain day and confer with them regarding the matter. At the termination of the conference, at which no agreement was reached, the manager of defendant corporation was served with process. This, the District Court held, was a valid service and in the opinion the Court said:

> "A corporation is not necessarily found in the county or district merely because one of its general officers may be there, though the officer be its general manager. But when he is in the county or district, *under charge of the corporation,* to do something with respect to the

> business upon which the suit is brought, and when his being there is not the result of fraudulent enticement, I can see no reason why service on him is not service upon the corporation, or why the corporation is not, in his person, and during the time covered by his presence for such a purpose, itself present in the county or district. Had the matter been the manager's individually, and the suit been against him individually, there can be no doubt the service, under the circumstances stated, ought to be maintained; but the general manager was, for the time being, in the matter in which he was sent, the corporation, and brought to this county and district the presence of the corporation as effectually as that could be done. The corporation sending him to transact the corporate business was, within the limits of that business, itself present."

To the safe effect is the decision in Brush Creek Coal & Mining Company v. Morgan-Gardner Electric Co., 136 Fed. 205. The defendant was an Illinois corporation, which maintained no office or agency in Missouri. Plaintiff placed an order for the construction of an engine with defendant. Trouble arose over a faulty construction. On his return from a business trip, the assistant general manager of defendant stopped off at Kansas City, where the engine was located, for the purpose of adjusting their differences. Judge Amidon in his decision reiterated the reasoning in the Houston v. Filer case, supra, and went even further in holding that if the officer served were a general officer, the extent of the business transacted in the state was not in issue provided he was there on business of the corporation.

The Court said:

> "Much of what is said in this case, goes to the question whether the agent upon whom process was served was of sufficiently high grade so that he could be 'properly deemed representative of the foreign corporation'. As bearing upon that question, the fact whether the company was actually engaged in business in the state, and the extent of the business committed to the management of the agent, would be material. But if the officer served was a general officer of the corporation, then the extent of the business transacted by him in the state is of no importance in determining the question as to whether he is of an official rank such as to make him properly representative of the company. The precise question under consideration was before the Circuit Court for the Northern District of Illinois in the case of Houston et al. v. Filer & Stowell Co., 85 Fed. 757, and it was there held that, when the manager of a corporation goes into another state on the business of the corporation, service of summons against the corporation in a suit *relating to that business* may be made on him there, although the corporation does not transact business in the state so as to make it an inhabitant thereof. In my judgment, the opinion in this case is a correct exposition of the law. *Any individual may be served in any state where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption.* it ought to be held to be present in any state to which it sends its general officer for the transaction of its corporate business."

To the same effect are the decisions of a number of State Courts, among which are Berlin Iron Bridge Co. v. Norton, 51 N. J. Law 442, 17 Atl. 1079;

Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640 and Moulin v. Trenton Mutual Ins. Co., 24 N. J. Law 233.

There is also apparent authority for the contrary position where, however, the officer of the corporation is not authorized to settle the controversy, and some of the Federal jurisdictions have held that an officer of a corporation who comes into a state for the purpose of conferring with reference to a dispute with a resident does not, by that act, "do business" within the meaning of the law. This was held in the case of Louden Machinery Co. v. American Malleable Iron Co., 127 Federal 1008. There, an officer of defendant, an Illinois corporation, went to Iowa to confer with attorneys for plaintiff. At the termination of a conference, defendant's representative stated it would be necessary to submit the matter before the board of directors. He was thereupon served with process. Defendant did no other business there, and the Court held the service on defendant's official was insufficient to confer the jurisdiction of the Courts upon it. It must be stated, however, that the officer had no authority to make a settlement, but could only carry the proposition back to the board of directors.

In this jurisdiction, however, the Circuit Court of Appeals has followed the majority opinion, hereinbefore expressed, and in Premo Specialty Manufacturing Company v. Jersey-Creme Company, 200

Federal 352, a case which was argued before Circuit Judges Gilbert, Ross and Morrow, involving virtually the same matters as in the case now before the Court, flatly upheld the position taken by the plaintiff in error in the present case.

The defendant Jersey-Creme Company was a Texas corporation which entered into a contract in Los Angeles for the purchase of aseptic straw dispensers. T. E. Blanchard, the secretary of the defendant corporation was a resident and citizen of Texas. It appeared from the affidavits on file that he visited Los Angeles for the purpose of ascertaining whether a shipment of the straw dispensers was to be made by plaintiff, that being the extent of his authority, and he was not authorized or empowered to transact any other business for the defendant corporation, which had no established business or property within the State of California. After negotiations between the parties, no agreement was reached and Blanchard was served with a copy of summons and complaint concerning the same matter. A motion to quash the service of summons was made on the part of defendant, which was granted by the District Judge. It was held that the actions of Blanchard in coming to California for the purpose of adjusting a contract entered into between the corporations was sufficient to show that the defendant was "doing business" within the meaning of Section 411 of the Code of Civil Procedure of California.

It was there held that

> "The service of process upon an agent of a foreign corporation, who comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which service is made, appears to be above all other class of agents the one upon whom service should be made, in order that notice may be promptly given to the corporation, and that it may be fully advised in the premises, and we see no reason why the foreign corporation doing business within the jurisdiction under such circumstances should not be bound by such a service."

In the Premo Specialty case the contract out of which the controversy arose was made and was to be performed in California, and it is sought to distinguish this case from the one at bar upon this ground. But it must be remembered that the defendant in error is an *alien* corporation; that it may be served anywhere it may be found, and it has been found in the State of California where it was present in the person of its agent Ivanoff doing the business of the corporation. However, the facts are not so widely different. The original contract was a sale by the plaintiff in error, whose principal place of business is in San Francisco, to the defendant in error, at Vladivostok, Siberia, and delivery of the said merchandise was for the account of defendant in error at San Francisco. The goods were delivered to the SS. "Ecuador" and "Tenyo Maru" at the port of San Francisco for transportation, consigned to Vladivostok, Siberia, to defendant in error

(Tr. 43). In the Premo Specialty case it was held that the delivery of goods to a common carrier under a contract for delivery f. o. b. cars was, in effect, a legal delivery to the purchaser, and it was there held that the delivery of the articles mentioned in the contract was therefore made to the defendant in Los Angeles. Here it is set forth that delivery was made at San Francisco for the account of defendants, as indicated. The original contract was therefore executed in California. This contract involved certain payment in due course. When it became impossible to make such payment the original contract was modified by a new one which provided for the retaking of the goods, their removal from Vladivostok to San Francisco and their sale by the plaintiff in error, and thereupon the goods were shipped to the plaintiff in error in San Francisco and were resold in San Francisco at a loss of $56,752.53 (Tr. 3). While it is true and it is admitted that the supplemental contract was made in Vladivostok, its performance was to be had and was had within the jurisdiction of the Court wherein it provided for the sale and disposition of the merchandise and the payment to the Walton N. Moore Company by the defendant in error, the merchandise having been brought back to San Francisco and sold as agreed.

The only remaining act under the supplementary contract was the payment to the plaintiff in error, presumably at its principal place of business, of the amount of the loss sustained by it, and it was

this precise business, which was necessarily to be performed in San Francisco, that the agent of the defendant in error was specifically directed to settle, and actually and voluntarily entered the jurisdiction for the purpose of complying with these instructions.

The substantial part of the contract and where it was principally to be performed was the sale of the goods in San Francisco, for it was there that the differences in price would reveal themselves upon which the responsibility, if any, of the defendant in error would thereupon accrue.

But it occurs to us that in the case of an alien corporation the fact that the contract was not made or to be entirely performed within the jurisdiction into which the corporation had gone in the person of its authorized agent is not material, for if the particular business connected with the contract upon which the parties were then engaged was being conducted within the State, it would not matter that other parts of the contract which led up to the doing of the particular business in hand might have been or have to be performed in another jurisdiction. Many contracts made in different parts of the world provide for performance in part in different countries and if the criterion of the right to serve and obtain jurisdiction upon an alien corporation doing business with one of the residents within a state of the Union is based upon the necessity of showing performance within the

jurisdiction of *all* the acts to be performed under a contract, or upon the fact that the corporation has an agency therein or is otherwise settled and established, the doctrine of In re Hohorst would be negatived and there would be but few cases where jurisdiction over an alien corporation might ever be obtained. Even if such a theory were to be approached it certainly could go no further than to require that the alien corporation to render itself liable for service on an agent must have entered the jurisdiction for the purpose of performing *any part* of the contract, which it was material upon its part to perform, even if other parts of the contract were to be performed in part elsewhere.

The principal point, it seems to us, is whether or not a corporation was legally within the State at the time of service if one of its authorized officers or agents entered the State for the purpose of carrying out or settling any matters connected with the contract, and if such were the case the corporation was personally present as effectually as if it were an individual who had come within the State to discuss the same business in his own behalf, and, within the limits of the particular business in hand, the corporation itself was in precisely the same position.

A corporation which engages in business by sending its representative into the jurisdiction for the purpose of adjusting and settling a difference through another whom it recognizes and authorizes to act as its agent, such as Ivanoff was when he

appeared at the office of the plaintiff in error, must be willing, by reason of the privilege of doing business accorded it, to defend itself by suit even though it is a long distance from its principal place of business. As was stated in the opinion in Estes et al. v. Belford et al., 22 Fed. 275, where an agent of a foreign corporation went into the jurisdiction of New York on the very transaction out of which the suit arose and was served therein:

> "This is not any hardship, or, if any, not an undue hardship, upon this defendant, as between it and the orators. It is compelled to answer away from its domicile, but not any further away than it has gone voluntarily by its agents to do that which has given occasion for the process and its service."

It is our contention that even though Mr. Haieff made the trip to the United States principally for the purpose of placing his daughter in an American school and to regain his lost health, and Mr. Ivanoff for the second time visited San Francisco and the office of Walton N. Moore Dry Goods Company, primarily for the purpose of acting as an interpreter for Mr. Haieff, yet they, in addition thereto, were deputized and acting in the business of effecting a settlement with Walton N. Moore Dry Goods Company by the Commercial Industrial Company. While here they represented their company in its business negotiations, and the company in contemplation of law was present in their persons, doing such business, regardless of the manner in which they occupied themselves before and after the transaction of the business in hand.

CONCLUSION.

For the reasons herein given it is respectfully submitted that the order granting defendant's motion to quash service of summons and dismissing the action and the judgment of dismissal should be reversed.

Dated, San Francisco,
April 29, 1922.

Respectfully submitted,
GREGORY & GOODELL,
Attorneys for Plaintiff in Error.